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PROPERTY RIGHTS IN PERCOLATING WATERS.

IT is assumed to be a firmly settled rule of law that the right of enjoyment of a running stream of water exists *ex jura natura*, and belongs to the proprietor of adjoining lands as a natural right incident to the ownership of the soil. Such proprietor is entitled to its use and enjoyment in like manner as he is entitled to other natural advantages of his estate. He is entitled to have the stream come to him in its natural state, in flow, quantity and quality, and it must go from his land in like manner, unobstructed in its passage. As such streams of water are for the benefit and comfort of the proprietor, he has the right to make such reasonable use of flowing water as is found consistent with the same rights which attach to every riparian owner both above and below his estate. He may divert it for purposes of use in manufacturing, but he cannot unreasonably detain it, and he must return it to its ordinary channel in a usual manner when it leaves his estate. He may permanently abstract such portion of the water as is necessary for domestic, agricultural and other uses, subject to the limitation that such abstraction shall not materially diminish the flow of the water in its usual volume, and is not inconsistent with the same right of reasonable use by the other proprietors upon the stream.[1] The rights and liabilities of the riparian owners in the extent and manner of use must, therefore,

[1] 3 Kent's Comm. 439; Barkley *v.* Wilcox, 86 N. Y. 140.

necessarily depend upon the facts and circumstances of the particular case. Subject to this limited right of use, no person can take the waters from a running stream, divert its flow, or change the course of the natural channel, without liability therefor to the riparian owner who suffers damage by the act.[1] It is of no consequence by what means the act of abstraction or diversion is accomplished, if in fact the water is withdrawn or diverted from its usual channel.[2]

There is little difficulty, either in definition of rights or in application of remedy for a violation of those rights in the case of water flowing in a defined channel. While the proprietor of the land has the right of use of the water, he has no ownership therein; his only right and interest is, to use and enjoy. It is a usufructuary right solely. The right to use, however, is not diminished by this limitation of property right. Neither is the right of use variable; it remains constant and continuing. For this reason, the right is not limited to the particles of water actually in the stream; it is a continuous right, which is only fully satisfied when the stream flows without sensible diminution. As we shall presently see, this statement involves the doctrine and rights of owners of percolating waters.

What constitutes waters of a running stream—which are protected by the rule we have stated—is a question not yet clearly settled or precisely defined. Lord Tenterden defined a running steam to be "water flowing in a channel between banks more or less defined."[3] Mr. Angell says, "A water course consists of bed, banks and water; yet the water need not flow continually; and there are many water courses which are sometimes dry."[4] "A natural water course is a natural stream, flowing in a defined bed or channel, with banks and sides, having permanent sources of supply. It is not essential to constitute a water course that the flow should be uniform or uninterrupted. The other

[1] Village of Delhi *v.* Youmans, 45 N. Y. 362; Pixly *v.* Clark, 35 N. Y. 520.

[2] Van Wicklen *v.* City of Brooklyn, 118 N.Y. 424; Ætna Mills *v.* Brookline, 127 Mass. 69; Proprietors of Mills *v.* Braintree Water Supply Co., 149 Mass. 478; Grand Junction Canal Co. *v.* Shugar, 6 Ch. App. 483.

[3] Rex *v.* Oxfordshire, 1 B. & A. 301.

[4] Angell on Watercourses, § 4.

elements existing, a stream does not lose the character of a natural water course because in times of drought the flow may be diminished or temporarily suspended. It is sufficient if it is usually a stream of running water."[1] This definition received approval in Bloodgood *v.* Ayers.[2]

It is noticeable that none of these definitions embrace in terms the source of supply as a part of the stream. A spring breaks to the surface by force of some power operating below the ground, and from it flows a perennial stream. The spring, however, does not fall within the express terms which the authorities have used in definitions of a running stream, the waters of which may not be abstracted or diverted. Andrews, Ch. J., in Barkley *v.* Wilcox,[3] refers to a stream as one "having permanent sources of supply;" yet clearly his definition did not embrace the source as a part of the stream. In Village of Delhi *v.* Youmans,[4] however, the court assumed that a spring was a part of the running stream. Peckham, J., said: "If the action of the defendant took the water away from the spring, after it had reached there, after it had become a part of an open running stream," then an action would lie.

It is here that we arrive at a difficulty which is necessarily inherent in the character of the respective rights and liabilities of adjoining land owners in relation to percolating waters and those of riparian owners in running streams. It is evident that at this point the right of the riparian owner begins to fade until it disappears in the right of the land owner upon whose land is the source of supply. The question of where the riparian owner's right ends and the right of the adjoining land owner begins, has furnished the occasion for a display of learning, ingenuity and reasoning power rarely equaled in forensic debate or expressed in judicial decision. Research has seemingly exhausted all the sources of knowledge of the subject, while ingenuity in statement and power of reason have attained their highest expression. The difficulty is inherent in the problem and arises out of the necessity of giving to each person just recognition in the exercise of legal rights.

[1] Barkley *v.* Wilcox, 86 N. Y. 143.
[2] 108 N. Y. 400.
[3] *Supra.*
[4] 45 N. Y. 363.

It is plain beyond controversy that the riparian owner has the legal right to a continuous flow of water in a running stream; and it is settled beyond debate that the owner of the land has a property right in the water percolating below its surface and, subject to some exceptions to be noticed hereafter, may appropriate it to such use as he chooses without liability to any other person. It is evident, therefore, that where a running stream is supplied by a spring issuing from the earth, whose source is percolating water flowing in no defined or known subterranean channel, the right of the riparian owner, if upheld, requires that the right of the adjoining land owner to intercept the percolating water, by cutting off the source of the stream, be denied or limited. Under such circumstances, whose right must yield? Whose legal right shall be denied? And if neither right shall be upheld as absolute and unqualified, what rule shall obtain? That these are troublesome questions was at once recognized when they first arose. That the "waters" are yet troubled is evident from the very last expression of the judicial mind upon the subject. In fact, so troubled and muddy are the judicial waters at times that the rights of the parties are not yet sufficiently clarified to be easily seen. Upon this branch of our subject, it seems necessary to call attention to some of the leading judgments that have been pronounced.

Chasemore *v.* Richards[1] presented a case of the plaintiff as owner of a mill upon a running stream, the waters of which he had enjoyed for upwards of sixty years as a motive power for his mill. The defendant sunk a well near the river, which intercepted the water percolating through the strata into the river, and also cut off the source of the springs which rose to the surface, from some of which flowed small surface streams to the river, and from others, water percolating underground, reaching the same goal. The water thus diverted sensibly diminished the flow in the stream, and damaged the plaintiff. He had a verdict at the trial, which upon appeal was reversed. In the elaborate discussion which was had, it was assumed that the case presented alone a question of the diversion of percolating waters flowing in no known or defined channel, although

[1] 7 H. L. Cas. 349.

in the statement of fact there appeared, in part, to be well-defined streams from some of the springs which entered the river upon the surface of the ground. This case clearly enunciates that there is no right of use by the riparian owner of water entering a running stream by percolation; and that an adjoining owner through whose land the water percolates may cut it off with impunity, even though it sensibly diminishes the flow of water in the stream and inflicts serious damage upon the riparian proprietors. The basis upon which the rule rests the court found in the fact that the proprietor of the land owned the percolating water therein as a part of the soil, and that he possessed the clear legal right to make use of the same in any manner that he chose, even though it cut off the supply of water to running streams, or diverted water which otherwise would flow upon adjoining lands.

The doctrine laid down by Pollock, C. B., in Dickinson *v.* Canal Co.,[1] that to divert water from a running stream is unlawful, whether the water was abstracted before or after it reached the channel, was repudiated, and the rule in Acton *v.* Blundell[2] was accepted as decisive in principle of the question presented. The latter is a leading case and announces a rule of law which has been uniformly accepted by the courts of England and of this country, save alone, I think, in the decisions of the Supreme Court of New Hampshire.[3]

The decision in Acton *v.* Blundell, however, did not necessarily determine the question presented in Chasemore *v.* Richards. The only question arising in the former related to the right of an owner of land to intercept percolating water when engaged in making legal use of his land. In opening a mine he cut off the source of supply of his neighbor's well; and it was held that for such act no liability attached. This holding was rested upon the ground that as the flow of water in underground channels was obscure, uncertain and unknown, and as their existence, origin, course and movement were concealed, any attempt to make administration of respective rights by legal rules

[1] 7 Exch. 280.

[2] 12 M. & W. 352.

[3] See Barrett *v.* Company, 43 N. H. 569; Swett *v.* Critts, 50 N. H. 439.

would be attended by hopeless confusion and would naturally result in working more of injustice than justice. This and modern cases have also asserted that the recognition of correlative rights was opposed to a sound public policy, as it would work mischievous results in curtailing the improvement of land, and would burden its use with liabilities which would render the exercise of such legal right extremely hazardous.

The Acton case involved no question of rights in running streams, nor in sources of supply thereto; and while undoubtedly its principles have general application in consideration of the question presented in the Chasemore case, yet, with deference to the learned Court who decided that case, they do not seem to be controlling of the question involved therein. We are not, therefore, surprised to find that when the right was asserted to intercept the waters of a spring, the source of supply of a running stream, in Grand Junction Canal Company *v.* Shugar,[1] Lord Hatherly denied the existence of such a right, saying that in respect thereto, with the Chasemore case before him: "If you cannot get at the underground water without touching the water in a defined surface channel, I think you cannot get at it at all." The suit in that case was for an injunction restraining the defendant from diverting the water of certain springs running into a pond, by means of a drain excavated upon the defendant's land. It is quite evident that the act which cut off the springs was by intercepting the flow below the surface of the ground and before the waters had reached the channel of the running stream. Yet the act of interception necessarily caused some of the particles of water that had reached the stream to recede, and thus be lost to the riparian owner. And for this reason, and upon this narrow ground, the case is distinguishable from the Chasemore case, so far as effect is given to the legal reasons assigned for the judgment in the latter case.

We are not ambitious, however, to attempt a reconciliation of these two cases—either of the judgments which were reached or in the reasons upon which they proceeded. The judgment in the Grand Junction Canal Co. case and the rea-

[1] 6 Ch. App. 483.

sons given closely resemble the judgment pronounced by Portia and the reasons assigned therefor:

> "This bond doth give thee here no jot of blood;
> The words expressly are, a pound of flesh :
> Then take thy bond, take thou thy pound of flesh;
> But, in the cutting of it, if thou-dost shed
> One drop of Christian blood, thy lands and goods
> Are, by the laws of Venice, confiscate
> Unto the state of Venice."

Lord Hatherly may not have used the same elegance of expression, but he was quite as vigorous in asserting that if, in the exercise of the legal right to take the spring, one drop of water was taken from the running stream, such act was "confiscate" of the legal right.

It seems to be evident, therefore, that the adjudicated cases in England do not settle with clearness the respective rights of riparian owners in and to percolating water which is a source of supply to a running stream. The Chasemore case seems to have denied any right of saving to the riparian owner small streams whose source of supply is springs, even though they run in well-defined channels upon the surface of the ground from the spring to the large stream. As to the subterranean streams which feed the river, the right is clearly denied, and the legal right of the owner of the land in the percolating water is upheld. In the Grand Junction Canal Company case it is equally clear that the owner of the land upon which issues a spring, the source of supply of a running stream, has no right to intercept the source of supply of the spring. With the latter limitation, it may, we think, be safely said that the law of England protects the owner of land in the enjoyment of percolating water to the fullest extent, in practical measure the same as in the enjoyment of his land.

The Grand Junction Canal Company case, so far as it maintains the right of the riparian owner in and to the source of supply to the running stream which the spring furnishes, is in harmony with the views expressed in Village of Delhi *v.* Youmans.[1] Therein it was assumed that the spring, under the circumstances to which we have adverted,

[1] 45 N. Y. 362.

was to be regarded as a part of the stream. Such we conceive now to be the settled American rule of law. At least, it is so settled in the State of New York.

In Arnold *v.* Foot,[1] the defendant was the owner of land upon which issued a spring, from which flowed a stream through the defendant's land to and upon the plaintiff's premises. The defendant diverted the stream, so that it flowed entirely upon his land. Savage, Ch. J., in delivering judgment, said: "In the case now before the court, the water from the spring in question was wont to run, *currere solebat*, in a direct line, into the plaintiff's premises. This was the direction given to it by Providence; it was intended to water the land immediately below the spring; and it must continue to water that land, no matter who may be the owner. The defendant has a right to use so much as is necessary for his family and his cattle, but he has no right to use it for irrigating his meadow, if thereby he deprives the plaintiff of the reasonable use of the water in its natural channel."

It would be a right of little value to the riparian owner, if the owner of the land upon which the spring was situated could intercept the water before in reached the spring which supplies the channel. To support such right, and yet deny the right to divert the stream, leads, it seems to us, to a practical inconsistency. And yet it is said in Village of Delhi *v.* Youmans: "But if it [the act] merely prevent the water from reaching the spring or open, running stream, by intercepting its percolation or underground currents, by digging a well upon defendant's own land, for the use of his family and stock, this action will not lie." And with more of assertion than of reason, as it seems to us, the learned Judge adds: "The law is settled in that way, both here and in England."

The question again arose in Bloodgood *v.* Ayers.[2] That was a suit in equity to restrain the defendants from continuing to divert the waters of what was claimed to be a running stream. Upon the defendant's land arose a living spring, the overflow from which, however, ran in no defined channel over the plaintiff's land; that some portion of the

[1] 12 Wend. 330.

[2] 37 Hun, 356.

water from the spring flowed over the sod upon plaintiff's premises was apparent; that it then disappeared in the ground and again came to the surface where the plaintiff had established his reservoir was quite probable; but such conclusion was only established by inference or reasoning. The Supreme Court held that it did not clearly appear that the water which flowed upon the plaintiff's premises came from the overflow of the spring; or, if it did, that did not constitute the same a water course, within the definition laid down in Barkley *v.* Wilcox.[1] This case recognizes the rule that there may be lawful diversion of percolating water before it reaches a spring which is the source of supply of a running stream. Upon appeal to the Court of Appeals, the judgment was affirmed,[2] the Court holding that such a spring belongs exclusively to the owner of the land, and is of the same character of property as is the earth or minerals beneath the surface of the land. In Macomber *v.* Godfrey,[3] it was held that a stream with defined banks did not cease to be such where it spread out over the surface of the land in no confined channel, but continued to flow until it again reached a defined bed.

These cases serve to show that the tendency of the courts has been to protect the right of the riparian owner in the source of supply of the running stream, and to deny a right in the owner of the land to intercept such flow, even though it be done by intercepting the percolating water which supplies the source of the running stream. But it is noticeable that in the discussions which deny this right of interception, it is always assumed or asserted that the act which intercepts the supply takes from the water already in the spring or stream. The qualification is usually made that, if the act does not accomplish this result, it is the exercise of a legal right, and protected as such. Under this rule, it is evident that the right of each party is extremely dubious. We shall hereafter suggest a rule, not new perhaps, but which, in view of modern conditions, may at least be practically applied and save the substantial

[1] 86 N. Y. 143.

[2] 108 N. Y. 400.

[3] 108 Mass. 219.

rights of each party. Some authority and much reason exist therefor.

In the past four years, the Supreme Court and the Court of Appeals in the State of New York have had occasion to consider and decide a new phase of the question of property rights in percolating water. First, as connected with the interception of such water as a source of supply to a spring, the source of a running stream and pond; second, the right of adjoining owners of land in extracting percolating water in the soil, not for use upon the land of either party, but with the purpose to gather such waters for transportation and sale to non-resident persons; third, the right of a municipal corporation to sink driven wells, and by means of powerful pumps draw to its station the sub-surface water percolating in the soil over an area of from five to eleven square miles, and the liability incurred thereby to adjoining owners. The City of Brooklyn, for the purpose of obtaining a water supply for its inhabitants, acquired title to certain lands in the County of Queens and constructed thereon a reservoir, aqueducts and culverts or conduits for holding and carrying water. In connection with this construction, it sunk wells and connected them with powerful steam pumps, by means of which in 1895 it extracted 36,421,147 United States gallons of water daily. The amount withdrawn increased thereafter until it reached about 42,421,147 gallons daily. The effect of this operation was to lower the hydraulic grade or spring line over a considerable extent of country, resulting in the destruction of a brook and pond owned by the plaintiff, and also of a large number of wells throughout the same locality. Action was brought against the city by the owner of the brook and pond to recover damages for their destruction. The Supreme Court, in a somewhat elaborate discussion, held that the defendant was liable for sucking away the source of supply of the spring, brook and pond.[1]

This decision was rested upon two grounds: First, that the doctrine which obtains between adjoining land owners, exempting them from liability for the interception of percolating water when engaged in making use of the land either for business or domestic purposes, agriculture or mining, or

[1] Smith *v.* City of Brooklyn, 18 App. Div. 340.

otherwise improving it, had no application; that the rule laid down in Acton *v.* Blundell and other cases of similar import was distinguishable, for the reason that such rule was limited in its application to the use of the land as such for some one of the recognized purposes to which the same could be devoted, for the pleasure, business or profit of the owner; that the use of the land for the sole purpose of drawing out the sub-surface water from the land of adjoining owners, storing and transporting the same for the use of the inhabitants of the city, who had no interest whatever in the land, was not the exercise of a legal right possessed by the city. Second, that as applied to a running stream and the right of the riparian owner as to it and its sources of supply, the maxim, *Sic utere tuo ut alienum non lædas*, applies, the rights and liabilities being dependent upon the particular facts of the particular case as applied to the doctrine of reasonable use and relative rights. As the complaint was dismissed at the trial, the judgment was reversed.

After a new trial, in which the plaintiff had a verdict the case was considered by the Court of Appeals[1]. It supported the recovery, but limited the ground upon which it based its judgment to the single question of right to divert the waters of a running stream, saying: "It is settled by the decisions of the courts of this State, and it is the rule in England, that no one may divert, or obstruct, the natural flow of a stream for his own benefit, to the injury of another. * * * All the cases hold that the water of a natural surface stream is for the benefit of all the riparian owners, and that to divert or to diminish its flow in any way, is an interference with a natural right which will give rise to an action for an injury sustained. That the diversion and diminution of the stream were caused by arresting and collecting the underground waters which, percolating through the earth, fed the stream, does not affect the question." When this fact appeared, and that the defendant was the actor causing the injury, liability attached. The court refused to consider the rights in percolating water not connected with the supply of a surface stream, as not presented by the case under consideration.

[1] Smith *v.* City of Brooklyn, 32 App. Div. 257; 160 N. Y. 357.

Taking the doctrine of this case literally as expressed in the language of the opinions deciding it, it settles beyond cavil the question that no one, for any purpose, can intercept the underground source of supply of a running stream so as sensibly to diminish its flow, without liability to the riparian owner suffering damage. The rule announced by Lord Hatherly in Grand Junction Canal Co. *v.* Shugar,[1] and the interpretation which we have placed upon it in this article, is expressly confirmed. It is to be borne in mind, however, that the facts of the case out of which arose this expression of doctrine were novel, having never arisen or been judicially considered before. The case was radically different from the improvement of land by an adjoining land owner. In consideration of the latter question, it has been asserted in terms quite as strong as the last utterance, and by the Court of Appeals, that if, in digging a well upon his own land, the owner intercept the underground current supplying a spring, the source of a running stream, no liability attaches[2]. These two pronouncements seem to us to be in conflict. There are two things, however, clearly common to both cases. Each cites; in the main, the same authorities to support its doctrine, and each asserts that its rule of law is well settled in the courts of this State and in England.

In view of these judicial utterances, it is difficult to determine with certainty what the rule is which will finally be applied to all cases of the interception of percolating waters that supply running streams. If the interception be by the exercise of a legal right in the improvement of land by the owner or possessor, the mere interception of the unknown current of water, even though it interfere with a running stream, does not create liability as matter of strict law unless it takes from the particles of water in the stream. To hold that it does overrules the doctrine of Acton *v.* Blundell and the long line of cases which have followed and sustained it.[3] The application of such rule entails many of the burdens and hazards which the courts have said ought not to attach as a penalty to the improve-

[1] *Supra.*

[2] Village of Delhi *v.* Youmans, 45 N. Y. 362.

[3] Bloodgood *v.* Ayers, 108 N. Y. 400.

ment of land. The special features of the Smith case can easily distinguish it and its doctrine from application to the improvement of land by an owner. Such rule, to the extent to which it was carried, was not essential to the decision, and the court pronouncing it has the reserved right to disregard it.[1]

As to sources of the percolating supply of running streams, there is much authority for holding that the correct rule is that laid down by the Supreme Court; and that in the improvement of land by an owner, the doctrine of reasonable use and relative right more nearly answers to the respective rights of each party and clearly protects property and other rights of each.[2] What is a reasonable use under such circumstances becomes a question of fact for determination by a court or jury.[3]

In orderly arrangement, we come now to examine the question of rights in percolating water disconnected from a source of supply to a running stream. As between adjoining land owners, there is now no question that the property right is complete in the owner of the soil, and he may do with it as he pleases. If it flows from his land to that of his neighbor, the latter acquires no right therein as against the owner of the land, who may at any time cut it off or divert it, as he chooses, even though in the exercise of such right his neighbor is damaged by being deprived of its use. No rights therein can be derived from adverse uses or prescription, so long as the flow is concealed and unknown; and in intercepting its flow, as it is the exercise of a legal right, the question of motive is unimportant.[4] This rule, however, ceases to operate when the owner or purchaser of land uses the same solely for the purpose of drawing thereto all or such portion of the sub-surface water as is contained in adjoining lands, as the necessity or desire of such owner may require.

In Forbell *v.* City of New York,[5] the question as to the right to divert or intercept the flow of percolating water

[1] Colonial City T. Co. *v.* Kingston R. R. Co., 154 N. Y. 493.
[2] Smith *v.* City of Brooklyn, *supra.*
[3] Colrick *v.* Swinburn, 105 N. Y. 503.
[4] Phelphs *v.* Nowlin, 72 N. Y. 39.
[5] 47 App. Div. 371.

and draw it to one spot, was considered. The purpose for which the water was taken and the circumstances were precisely the same as in the case of Smith *v.* City of Brooklyn,[1] except that there arose no question of rights in running streams; the diversion or interception was of percolating water solely. The plaintiff was the owner of land upon which he cultivated celery and other vegetables needing a wet soil for their proper production. The action of the defendant's pumps drew away the subsurface water, destroying the land either wholly or partially for such purpose of use. The Supreme Court held that such accumulation of sub-surface water was not the exercise of a legal right in the use of the land as against the adjoining owners, and that liability attached; that the reasoning which upholds property rights in percolating water wholly fails as applied to such a situation; that it is of no consequence that the flow of the subterranean stream was concealed and unknown; what was known was the fact that when the pumps were applied to the wells, their operation would draw substantially all the subsurface water to a given spot, and despoil the owner of the adjoining land of its beneficial use and enjoyment; that carried to its logical result, it would authorize the destruction of the adjoining land for purposes of agriculture, practically converting it into a desert, and this without the slightest pretence of the defendant's improving its own land. It is manifest that under such conditions, the reasoning of the cases which support the right to intercept percolating water and prevent it from finding its way upon or from the land, can have no application. Neither was there present any pretence of improvement of the land for any purpose of beneficial enjoyment, aside from the abstraction of water. The Court of Appeals[2] affirmed this judgment for substantially the same reasons as were assigned by the Supreme Court, holding that the adjoining land owner was protected against such abstraction of percolating water; that while the right existed in the municipality to obtain the water for the use of its inhabitants, yet the land owner was not required to submit to being despoiled of his property right

[1] *Supra.*

[2] 164 N. Y. 522.

without compensation; that in order to acquire the right thus to despoil the land, the city could institute proceedings *in invitum* and acquire the right upon making compensation.

The second in order, and last of the decisions to which we shall call attention, is found in Merrick Water Co. *v.* City of Brooklyn.[1] The facts of this case presented two corporations, one private and the other municipal, both of which were engaged in extracting percolating water from the soil by similar means for purposes of transportation and sale. The Court held that the relative rights of such parties were not different in principle from the rights of adjoining land owners in respect to the subject-matter, and that as to percolating water the Court would not undertake to measure the respective rights of the parties therein; that as each was using the land for the same purpose, the rights of each were equal, and if one obtained more water than the other there could be no more ground of complaint than would exist if, in the improvement of their respective properties, one secured more water than the other or one was damaged and the other not. It was, therefore, held that no legal right was infringed. Upon appeal, this decision was affirmed by the Court of Appeals without opinion.[2]

So far, therefore, as the law in the State of New York is concerned, respecting property rights in percolating water, we may say, although with considerable diffidence, that it resolves itself substantially into the following rules:

First.—As to subterranean sources of supply to the fountain or running stream, they may not be diverted after they have reached the fountain or stream; nor can the source of supply be diverted if it cause any water actually in the fountain or stream to recede, no matter how slight be such recession. The usufruct is of the stream as an entity, and is not limited to the present particles of water therein.

Second.—The use of land solely for the purpose of abstraction of water does not confer any legal right to deprive

[1] 32 App. Div. 454.
[2] 160 N. Y. 657.

a fountain or running stream of water of its source of supply, whether such abstraction be accomplished by taking the water from the stream after it has entered it or the fountain, or by sucking away the percolating water before it has reached the open goal. Either or both acts are alike actionable.

Third.—The right of an adjoining land owner in the improvement of his property does not extend so far as to authorize interference with water after it has reached a spring or fountain which is part of a running stream, even though such interference is of the source of supply thereto before it reaches the open.

Fourth.—The right of an adjoining land owner in the improvement of his property, or for use upon his land, to intercept percolating water which reaches a running stream, but before it has arrived at such point, is not clear. The modern rule seems to be that such right is not absolute, but rests in the doctrine of reasonable use and relative rights, which in a given case will usually present a question of fact.

Fifth.—Adjoining owners own the percolating water in the soil by the same title upon which they hold the land. They may make such use of the water therein as they choose and are not liable for the interception of percolating water, even though it cuts off the supply of the adjoining owner.

Sixth.—The last preceding rule has no application where the purpose of use of the land is solely to obtain water from adjoining premises for purpose of transportation or sale. The abstraction of water under such circumstances infringes the legal right of an adjoining land owner, for which an action will lie.

Seventh.—No liability attaches to persons or corporations, as against each other, who are engaged in the use of land for the purpose of abstracting percolating water therefrom to transport or sell the same to others. Their rights as between themselves are equal and no action lies, although one may obtain more water from the same territory than the other.

EDWARD W. HATCH.